

Representing European citizens? The EU ombudsman's forum in shaping the common European identity*

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Abstract:

As the EU faces its deepest crises, the EU itself does want to keep and enhance its openness and visibility. In this efforts means which take the EU and its citizens closer to each other gain more importance than before. The paper provides an insight into the fact that the EU Ombudsman's procedure and its outcome not only affects the complainant and the EU administration but has overlapping effects. EU Ombudsman represents an alternative dispute resolution forum. It is demonstrated in the paper that although established as a classical mediator, the EU Ombudsman is slowly moving beyond its original function and its mandate. The paper highlights the forms of this move, explores the limits of this activity and the complex nature of this mandate through the lens of the EU Commission and the Court of Justice of the European Union (CJEU). The paper argues that the forum can and will be a forum of trust facilitating the nowadays strained relationship between the EU and its citizens.

Keywords: European identity, European citizens, EU Ombudsman, non-judicial forum, complaint, fundamental rights

1 INTRODUCTION

The possibility to complain to the European Ombudsman¹ was the result of a long way, which cannot only be investigated from the 1970's. An ombudsman office exercises important functions which were important hundreds of years ago as well, when its ancestors functioned under different names. These offices seen as its ancestors were independent from the actual state structure. After researching one period of the Swedish history, which witnessed the establishment of the ombudsman office, it has led to the conclusion that the body was originally set up as a part of the executive branch and principally not for the protection of the citizens – and acted essentially as its extended hand for its interest (as seen by the earlier ancient examples as well).

2 THE ESTABLISHMENT OF THE EUO

Although, in one dimension of Europe, namely in the life of the European Community, the issue of the Community Ombudsman – particularly in the European Parliament – was the subject of debates already in 1974, the institutional set-up had to wait nearly two decades. The reason of this was that certain conditions had to meet each other at the same time.

First of all, the European integration itself had to reach a certain level through some development, when beyond the economic cooperation the issue of political union could have been raised. The latter was closely related to European citizenship, which was seen as one important base of the future Union, of the democratic legitimacy. When citizenship rights were adopted, it was argued that specific bodies should also be created for supervising these rights. In this subject it was suggested that if EU citizens were allowed to file a complaint to a European ombudsman that would not only guarantee their rights and establish their greater protection but it would also ensure a direct link between the Union and its citizens.

Then, it was necessary to get the Member States slowly acquainted with the ombudsman institution. At the time of the first-round enlargement not even the founding states had ombudsman offices. It was also necessary to realize that with the help of individuals' complaints the ombudsman institution can ensure both a flexible and effective control over the executive arm of the state, the control of the

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¹ Art. 228 TFEU (ex Art. 195 TEC).

bureaucracy and the protection of citizens. Although a Spanish proposal aimed to set up the European office and a Danish memorandum supporting this idea also emphasized the need of an ombudsman post in the Community to fortify the democratic basis under the aegis of the European Parliament in 1990-1991, the subject was affected by several issues. The Community institutions did and do not show clearly the division of powers as experienced in democratic states. The review of a range of historic European policy documents such as various parliamentary reports, parliamentary representative's comments and other documents open up the influences and positions of representatives and commissions and make obvious that the date of the establishment was delayed by a mixture of fear of losing power and functions. The European Parliament (the Committee on Petitions) feared of a body with similar functions to be established, while the Commission saw it as a restriction of its powers. Finally, as the Community administration is quite decentralized, the apparatus had no such a strong power that would have affected the rights of the majority of citizens and as the citizens' fundamental and administrative rights had not been recorded at that time, there was no justified base for setting up a body responsible to protect these rights.

Therefore, it can be stated the supranational office had the chance to be born when the stage of the integration met the experience of the Member States on the ombudsman institution, and this was joined by the need for improving the control mechanism of the EU.

The Danish ombudsman office is clearly seen to be the model of the European office. Although, the Spanish proposal submitted the first detailed plan (and therefore, many authors consider this proposal the original model) and was strongly supported by the Commission, it did not intend to establish a supranational office. It intended to reach the protection of the European rights with ombudsman offices solely handling cases involving EU matters and proposed to establish the office at national level. The Danish proposal submitted after the Spanish one contained the plan based on the Danish ombudsman model: a one-person office holder, supranational, independent, appointed by the European Parliament, dismissed by the Court. The essential difference between the Danish (and Norwegian) and the Swedish (and Finnish) model is that while the former is considered as a kind of extension of the Parliament, in the latter the protection of the individual is more underlined. Besides the European ombudsman many countries followed the model of the Danish structure mainly due to its weaker authority: with wide range of means for inspection purposes but with no power to enforce any decisions or instruct any institutions or bodies.

3 Institutional Relations

3.1 The relation between the European Parliament and the European Ombudsman can be approached from many sides. I see the primary reason for establishing the office as a mean to provide a new level of exercising citizens' rights and do not to put emphasis on non-political reasons, on political balancing, despite the fact that at the beginning diverse political debates could be experienced. This relation is being determined by the political responsibility of the European ombudsman's activity, the close cooperation, the fact of being the Parliament's 'extended hand' and its supervising function regarding the Parliament. However, the role of the European Ombudsman is not a subordinate but a compound one: this is supported by the fact of having supervision over the Parliament in contrast to several national examples. As we cannot see a clear division of legislative and executive powers at European level, the European office does not meet the traditional image of Ombudsman ordered to the legislative power,² and although basically he is a Parliamentary Ombudsman, the supervision is extended as well to the Parliament. Nevertheless, this control is limited: as complaints in connection with activities or decisions with a rather political than administrative nature cannot be considered admissible. Hence, the Committee on Petitions cannot be supervised by the Ombudsman as its activities belong to the Parliament's political actions. Thus, the establishment of the office constitutes not only to the protection of citizens against the bureaucracy but additional means, whilst the European Parliament keeps the political power over its petition process.

One element of the relation when a complaint is considered as petition. In this case, the Ombudsman has the option to transmit it to the European Parliament. Another element of the relation that although the ombudsman has full independence carrying out its tasks, the Parliament is solely responsible for the election, dismissal and regulation of his tasks. The importance of their

² Meese, J. M.: *Das Petitionsrecht beim Europäischen Parlament und das Beschwerderecht beim Bürgerbeauftragten der Europäischen Union*, s. 182.

cooperation is evident by the fact that the Parliament can assist in the ombudsman's investigation and the ombudsman submits the annual reports to the Parliament.

3.2 The ombudsman's office has a similar unique relation with the European Commission. Even during the establishment of the office it was clear that the Commission did not want a body to supervise its activity. According to the relevant provisions, the decisions made during the ombudsman's proceedings and his legal interpretation (this can be regarded as practice) do not have binding nature, however, his activity is pushing the limits of the mandate. The different complaint-cases make clear and determine the relationship with the European Commission:

- in the question of legal interpretation the ombudsman's opinion is often adopted by the Commission, although the Ombudsman is also aware of the fact that the highest authority for the interpretation of Community law is the European Court of Justice;
- his recommendations are without binding power but some results of his complaint-procedure can be regarded as a source of soft law: on the non-binding recommendation of the ombudsman the Commission created a communication on relations with the complainants in infringements procedures;³
- in the Commission's infringement proceedings the ombudsman uses the above mentioned Commission communication as soft law.

3.3 The special relationship with the European Court must be touched on, too. The Court considers the complaint procedure as an alternative procedure next to its own, and this is the way how the complementary role of the European office can be explained: However, the Court clearly set up the border of the Ombudsman's mandate and activity in several judgments. Thus, when an applicant referred to a draft recommendation of the ombudsman, the Court of First Instance declared that an 'act of maladministration' by the Ombudsman does not mean in itself, that the conduct constitutes a sufficiently serious breach of a rule of law within the meaning of the case-law. According to the Ombudsman, an error of legal interpretation is a form of maladministration, and in a court case the applicant relied on the ombudsman's non-binding draft recommendation which included the ombudsman's own legal interpretation of a provision, the Court of First Instance stated that the conclusive interpretation of the law is not within the remit of the Ombudsman. Thus, it did not eliminate the ombudsman's interpretation only limited it. The Court of First Instance also pointed out that it has jurisdiction to entertain an action for compensation against the Ombudsman: it can examine the decisions and inquiries taken by the ombudsman thus has judicial control over them.⁴ This is very important because the Ombudsman has no jurisdiction to question a decision of an institution or body but as we saw the ombudsman gives his opinion even in connection with the merit of a decision. With action of damages against the Ombudsman the Court has the option to state that even the Ombudsman's actions can lead to maladministration – for whose prevention the office was established.

Because of the above mentioned relations, the office can be seen as an alternative support mean next to the Parliament and the Court but primary as an institution used by citizens for enforcing their interest and rights.

4 The relations of the EU Ombudsman and the EU citizens

The office of the European Ombudsman fulfils more than one role. These roles have evolved from the time of establishment and are still being formed.

4.1 The European Ombudsman – a public servant who is appointed by the directly elected European Parliament, reports its activities to the Parliament, and the Parliament has the possibility to initiate his dismissal – this is a key element in the parliamentary control over the executive power of the EU, namely over the European Commission and European bureaucracy.

³ Commission communication to the European Parliament and the European ombudsman on relations with the complainant in respect of infringements of community law (2002)/Communication of the Commission to the Council and the European Parliament: updating the handling of relations with the complainant in respect of the application of Union law (2012)

⁴ See T 412/05 *M v European Ombudsman* [2008] ECR II-197.

With the establishment of the European Ombudsman, citizens received a new mean against the EU institutions, bodies, offices and agencies, which enables them the possibility to complain about the procedure of these institutions, bodies, offices, agencies operating at supranational level.

When analysing the different types of complaints, it is no coincidence that the majority of inquiries affect the European Commission: we can declare that the EU citizens are involved through the European Ombudsman in the supervision of the Union's executive power.

4.2 The activities of the European Ombudsman are largely determined by the expressed critique regarding the lack of transparency in the EU institutional system. As we can see, cases involving lack of transparency including refusal of advice, make up the largest group since the forum's establishment, and a number of resolutions have been issued in connection with this type of maladministration. For example, according to Article 8 (1) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, in case of total or partial refusal the institution shall inform the applicant of the remedies: namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman. His activity related to access to documents led nearly all institution to adopt rules to access. Due to the large amount of cases related to lack of openness and access to documents, the ombudsman launched many own-initiative inquiry and requested the defaulting institutions to ensure adopting such regulations. It is important to mention the Ombudsman himself is to ensure transparency so that people could follow their cases and understand the proceedings that propagates good example.

4.3 As the European Council pointed out, the work and opinion of the ombudsman (or person holding similar functions) constitutes an important part in the evolution of general rules and principles governing the administration and the conduct of officials. Recognizing this need, the European Ombudsman recommended the institutions, bodies and agencies to apply rules that record the good administrative procedure for their own officials in relations with citizens. The development of principles of public administration would provide a framework for citizens to expect good administrative behaviour and set out procedural guarantees and would help citizens and officials to understand, what good and bad administrative procedure means. In order to clarify the right to good administration the European Ombudsman draw up the European Code of Good Administrative Behaviour, which contains guiding principles for the relationship between citizens and civil servants. In addition, the principle of good administration requires from the Community institutions and bodies the compliance with their obligations, the service-minded attitude and it ensures citizens the appropriate treatment. And good administration can be found under Article 41 and 43 of the Charter of Fundamental Rights as well.⁵ The ombudsman promotes the Charter through his procedure: takes into account its principles and rules when investigates instances of maladministration.

The activity of the European ombudsman regarding the relationship between the institutions, bodies and citizens can be called as intermediary. On one hand, the main tasks of the ombudsman is to deal with cases of maladministration and should serve as an effective means to 'redress'. On the other hand he shall publicise the good administrative behaviour – thus helping citizens –, which includes the cooperation with the administrative bodies to find adequate solutions for the improvement in their relations with citizens.

Protecting the rights of citizens and improving the relation between citizens and EU institutions and bodies go hand in hand, but the European ombudsman cannot be one-sided against the administration, he should also defend the institutions and bodies against complaints without sufficient ground. This ensures fair and impartial procedures, the reliability of the office, which makes it suitable to improve the relations between citizens and the bureaucracy. The European ombudsman helps civil servants of the Community institutions and bodies as well: even civil servants can complain to him against the administration.

⁵ The principle of good administration is enshrined in Court of Justice judgement of 31 March 1992 in Case-255/90 P, *Burban* (1992) ECR I-2253 and Court of First Instance judgements of 18 September 1995 in Case T-167/94 *Nölle* (1995) ECR II-2589, and 9 July 1999 in Case T-231/97 *New Europe Consulting and others* (1999) ECR II-2403. See Council of the EU: Charter of Fundamental Rights of the EU. Explanations relating to the complete text of the Charter. December 2000. Office for Official Publications of the European Communities, s. 58.

4.4 With the creation of the Charter of Fundamental Rights, the Union sought to strengthen its commitment to fundamental (human) rights. The Charter outlined the general human rights policy in 50 articles, among which two articles are about the ombudsman: Article 41 with the right to good administration and Article 43 with the possibility to complain.

The ombudsman is involved in strengthening citizens' rights within the Community and participates to make the institutions take seriously the Charter of Fundamental Rights. With the active involvement of the ombudsman the Charter was incorporated even into the draft European Constitution and the now it is part of the Lisbon treaty.

The ombudsman conducted many own-initiative inquiries regarding the rights of the Charter and his office uses the Charter regarding the complaints. The own-initiative inquiries prove that he is not only reactive but also proactive, thus contributes to more general issues involving the rights of citizens.

For more than a decade of activities the efficiency and results obtained justify its existence. The investigations carried out and the results achieved represent the degree of the proposed implementation of his procedure and proposed achievement. However, we may consider the lodged complaints an indirect indicator of efficiency because citizens being aware of their European rights activate themselves in the event of actual or possible grievances. The ombudsman builds up a direct link with complaining citizens, during his inquiries they are informed about their rights and opportunities: if he does not have jurisdiction he gives advice, provides information about other options or transmits directly the case to the relevant institution or body.

The citizen-friendly existence of the office, namely that the ombudsman is elected directly by the European Parliament but carries out the activities entirely independently, represents the office not as a distant body in the public eye unlike other EU institutions.

Conclusion

The ombudsman's work and opinion plays an important part in the development of general principles and rules of the administration. This is one important element of the ombudsman's work. To underpin the dispute solving side of the office I shall mention that reaching a friendly solution is the primary objective of the Ombudsman. This shows the ombudsman as médiateur: in this role he attempts to solve maladministration and even a variety of languages focus on this role (see, for example, médiateur européen/Mediatore europeo). On the basis of the above mentioned the European Ombudsman seems to play a complex role and his procedure cannot only be limited to dispute solving, creating or protecting fundamental rights. As in the past the Committee of Petitions pointed out as well regarding the ombudsman's role: the protection of the rights of citizens and the improvement of connection between citizens and the Community go hand in hand. And this can strengthen the sense of common European identity.

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